No. 48740-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

SAMUEL F. VALDEZ, Appellant

APPEAL FROM THE ORDER OF THE SUPERIOR COURT

OF THE STATE OF WASHINGTON FOR

WAHKIAKUM COUNTY

RESPONDENT'S BRIEF

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I. RESPONSE TO ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The challenges of pretrial publicity were successfully met by the careful procedures of the trial court in voir dire, and the parties selected a jury without the defense using all of its peremptory challenges.
2. The defendant made threats, showed a witness tools he would use to burn down a house within 24 hours of that house burning down, and was at the scene within hours of the fire; this satisfies the corpus delicti requirement.
3. The question whether "when a defendant [confesses] to starting a fire, but there is no other evidence that the fire was the cause of arson [sic]," is not before the court, as the facts do not require the court to reach it.
4. Appellant asks whether evidence of possession with intent to deliver marijuana is sufficient in a hypothetical case; the case before the court matches that hypothetical in no respect.

5. The issue characterized as "uncharged prior bad acts" is improperly preserved for appeal.

6.-8. The defense asks whether a prosecutor commits misconduct when making various errors that the prosecution did not make in this case.

9.-12. The defense asks whether defense counsel was ineffective for failing to object but does not meet its initial burden of proving the content was objectionable, much less the greater burdens of showing that any lack of objection was not tactical and was prejudicial.

13. The defense does not argue the question posed in its assignment of error, but rather reargues the defendant's indigence before this court.

II. STATEMENT OF THE CASE

Chris Horton moved to the Altoona-Pillar Rock area in 2012-2013 (three to three and a half years before February 2016). RP 264. He met local resident, and current defendant, Sam Valdez soon thereafter when Mr. Valdez visited Mr. Horton's home. RP

266-267. Mr. Valdez lived no more than two or three miles down the Altoona-Pillar Rock road from Mr. Horton. The two of them bonded over a shared interest in construction work and equipment – RP 267-268 – and other common interests, such as their shared enthusiasm for marijuana. RP 273. Mr. Valdez took Mr. Horton into his confidence regarding a business opportunity he was cultivating – the purchase of a machine to render concentrated cannabis oil out of marijuana. RP 272.

Mr. Horton found the defendant intelligent, and interesting to be around. RP 273. Their acquaintance grew into friendship. However, within a year, it became evident that Mr. Valdez was going through a divorce from Beth Robbins – RP 268 – and that the divorce was engaging increasing amounts of Mr. Valdez's time and emotional investment. It was an "almost daily" occurrence for Mr. Valdez to disparage Ms. Robbins to Mr. Horton. RP 269. "The man woke up angry," and that anger was directed towards Ms. Robbins. Id. Once Mr. Valdez found he could speak to Mr. Horton about the divorce, he opened up further about the depth of

his grudge and the extent of his plans. By then his anger was directed towards Ms. Robbins "or her family or anybody involved in the case." RP 270. "He was very, very upset with Beth and anybody that she was associated with that went to court [against him]. Anybody... that was on Beth's side or ... appeared to be on Beth's side, he was angry with." RP 270-271.

Mr. Valdez's anger waxed as the divorce went to trial. RP 277. His behavior changed. He went on drinking binges. Id. He crashed his car. RP 278. He wrecked his plane. Id. And his anger became more and more "violent." RP 326. He wanted to "get back at the people who testified in Beth's defense." Id. His primary targets as Ms. Robbins's allies were Tom and Mary Etta Bruneau and the family of Kathleen Cantrell, then named Hamilton after her deceased previous husband. Id., RP 254. He targeted the Bruneaus first: he took Mr. Horton with him on a scouting trip, saying they were going for a "boat ride;" then, during the trip, photographed the Bruneaus' catamaran and spoke with Mr. Horton about his plan to burn it. RP 345.

Mr. Valdez took steps towards burning Ms. Robbins's home as well, going to her house to do what he called "recon" preparatory to setting fire to it and her family's timberlands. RP 362. However, he believed the property was under video surveillance. Id. So nothing came of that. Neither did anything come of a brainwave Mr. Valdez had during one of the area's occasional massive rainfalls, to block a culvert near the Bruneau home in hopes the diverted flow would destroy their house. RP 349-351. It wasn't for lack of Mr. Valdez trying, though – he did block the culvert, but he told Mr. Horton, who later cleared the culvert without Mr. Valdez's knowledge or permission. RP 351-352. And one time after the divorce when Ms. Robbins was on property awarded to her across the street from his house – the property he was most bitter over losing to her (RP 209) – he went across the street and threw an apple at her. RP 237-238. Inspired by that, he picked up a rock, planning to brain her and make it look like an automobile accident, but she saw him holding the rock and

took a picture of him on her cell phone. RP 238, RP 441. This dissuaded him. Id.

Instead, it was the Cantrells who were the first to suffer at Mr. Valdez's hands. Mr. Valdez made comments about there being a "barbecue in the neighborhood" or "smoking out the neighborhood," and came around to Mr. Horton's house one day with the tools he planned to use to achieve this aim: cotton batting, soda bottles, matchsticks, and poisoned hamburger to silence the dogs at the house. RP 327-328.

On the early morning of the very next day, July 9, 2014, the Cantrell home burned to the ground. RP 874. Kathy Cantrell was awakened by a phone call at about one in the morning, but no one was on the other line. RP 930. At about 4:00 AM, the house was aflame, and her now husband Fred Cantrell woke her and got her out of the house. RP 931. By that time the kitchen was "roaring with fire." RP 932. Her home was leveled, and she and Fred lost a car, a truck, and a trailer to the fire. All they had left was one truck that Fred, though legally blind, managed to drive away from the

flames. Other than that, "We lost everything." RP 966. Included in their loss were the couple's two dogs, whose bodies were found inside the home. RP 943-944. Neither dog had awoken the humans, even though Fred's dog was "a barker." RP 943.

While the house was still smoldering at about half past seven that morning, the defendant drove up to the property and stopped next to an onlooker from the neighborhood, Peter McGuire. RP 896-7. His only question was, "Was anybody killed?" Id. McGuire said the inhabitants were alive but their pets died, and the defendant nodded and drove off slowly towards the dead end of Altoona-Pillar Rock Road, staring at the ruins. Id.

When Mr. Horton learned the house had burned, he contacted Mr. Valdez and they spoke in person. RP 328-329. Mr. Horton asked if he set the fire and Mr. Valdez said he had, and that he "gave them what they deserved." RP 330.

Mr. Valdez also took steps to improve his revenue stream. He had been in the marijuana business before his marriage to Ms. Robbins. RP 248. After the divorce was final, he moved back into

marijuana in a big way, purchasing the extraction machine (RP 284), installing it in his shop with Mr. Horton's help (RP 285), learning how to use it (RP 286), and using it to process ten pounds of marijuana per run of the machine (RP 288) into one pound (RP 296) of a concentrated oil with the consistency of honey (RP 277). He did not acquire the marijuana he fed into the machine through legal sources. RP 289. And he would sell to people who re-sold on the black market. RP 300-301.

But as the appellant grew in wealth, the grievances stemming from his divorce were never far from his mind. One day, he asked Mr. Horton whether Mr. Horton knew anyone who would be willing to kill Ms. Robbins for him. RP 437-438. Rather than have Mr. Valdez seek elsewhere for a hit man and maybe find one, he lied and said he had an uncle in the Midwest who worked for organized crime and could take such a contract. Id. Then, not knowing what else to do, Mr. Horton called the Wahkiakum County Sheriff's Office. RP 355. The sheriff's office, lacking the resources to handle a case of this nature, put him in touch with

Detectives Yund and Thoma of the Cowlitz-Wahkiakum Narcotics Task Force. RP 1140-41.

The Task Force, conscious of the fact that in Mr. Horton's words, his accusations of Mr. Valdez were "my word against his," RP 352, asked him to covertly record conversations with Mr. Valdez. RP 358. Mr. Horton reluctantly agreed. Id.

Task Force detectives sought and received four court orders to record conversations between Mr. Horton and Mr. Valdez. RP 1149.[1] Of the four orders, three resulted in recorded conversations.

The first recording occurred May 20, 2014. RP 369. In it, the defendant and Mr. Horton converse about the defendant's attempts to break into the marijuana processing business. RP 369 et. seq. And Mr. Horton buys some marijuana extract from the defendant. RP 384-5. The conversation later turns to Mr. Valdez's "list" of people with whom he has grievances:

THE DEFENDANT: ... I'm either going to have to hire a fucking gun or I'm going to have to fucking do it myself.
MR. HORTON: To who? These -- these people?

[1] The validity of those orders was upheld below and are not the subject of this appeal.

THE DEFENDANT: These people. The list.
MR. HORTON: The list?
THE DEFENDANT: The list. I'm working on -- I'm going to work on the fucking list. In fact, I've got -- you made me laugh, because there was one time you said to me, "Sam, there's no fucking morning I get up, I don't take my fucking shower, I think about who the fuck I'm going to kill today." And that has been the way it has been for me for fucking -- two fucking years.
MR. HORTON: Yeah.
THE DEFENDANT: And it's not fucking going away.
RP 393.

The defendant speaks at length about his obsession with his divorce and his desire to torment Ms. Robbins until he receives satisfaction. RP 393-4. During this conversation, he describes how burning the Cantrell house was a strike at Ms. Robbins:

THE DEFENDANT: I try to be nice about it as I can. But she's a stupid fucking bitch, you know. I want to tell her, "Well, I've tried to send you some messages. By the way, how's Kathy in her new house doing," you know?
MR. HORTON: Kathy? Yeah. Gotcha, gotcha. Kathy, and I don't remember his name.
THE DEFENDANT: Fred.
MR. HORTON: That's right. Kathy and Fred.
THE DEFENDANT: The fucking two liars in the courtroom.

RP 394.[2]

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[2] The State hates to restrict the court's view of the record and does not wish to do so by pointing out the portions directly relevant to conviction. The taped conversations, particularly in the areas referenced, are filled with statements by the defendant that have to be read (or heard) to be believed, and which leave no

The conversation about the arson continues:

MR. HORTON: You did them a favor by doing that. You know that?
THE DEFENDANT: I know it.
MR. HORTON: How did that fucking work? You burned their fucking house down and then they go and get insurance money and...
THE DEFENDANT: No. Actually, I think Beth has picked -- paid a big chunk on fucking building that house.
MR. HORTON: Fuck.
THE DEFENDANT: It's for real.
MR, HORTON: That shit. Come on. Cause she felt bad cause of what you did, right? That's exactly it.
THE DEFENDANT: You starting to get the picture of what I got to get the message to her? How much carnage do you want to be responsible for is the message I need to fucking get her.

As much as Mr. Valdez wanted to "send a message" to Ms. Robbins, he wanted her dead even more. In the same conversation, he moves on to discuss the logistics and cost of hiring a professional assassin:

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doubt as to the overwhelming and murderous hatred the defendant held for Ms. Robbins and anyone else involved in the divorce. What the State has quoted above is tame in comparison with what the State, in an effort to be circumspect in contrast to the appellant's biased presentation of the record, has left out. The State will continue by giving brief flavor and some quotes that directly relate to towards the elements, but the State recommends a fuller reading of the record for a view into a mind consumed by malice.

THE DEFENDANT: Now, wait a minute. Is that -- so that's $15,000 for the first head?
MR. HORTON: No. It's 15 for the two.
THE DEFENDANT: Oh, I see. First one ten and the rest are five.
MR. HORTON: Yes. As long as he's doing them while he's in town. If he has a to make a separate trip, it's ten.
THE DEFENDANT: Oh, I see. For each trip it's ten.
MR. HORTON: Yes, for each trip.
THE DEFENDANT: Well, you know, hey, I'm not going to get away with -- I mean, yeah, maybe I could get away. But it's got to be done in stages, so I'll end up –
MR. HORTON: Sure.
THE DEFENDANT: -- having to pay the ten.
MR. HORTON: M-hm.
THE DEFENDANT: You know, and plus airfare and whatever, so $1,100 -- $11,000 per -- I mean, that's -- it's going to be a stepping stone. Yeah. I'd like to wipe them all out, but –
MR. HORTON: Well, yeah, but you're not going to -you're not going to drop subtle hints by taking them all out at once.
THE DEFENDANT: No. No. Fuck, no.
MR. HORTON: Yeah.
THE DEFENDANT: No. I'm going to -- it's a stepping stone thing. RP 401-402.

However, the defendant was not willing to "pull the trigger" right then, and wanted to put off a final decision. RP 408.

On June 16, 2015, the defendant and Mr. Horton spoke on the matter again. Again, the parties discuss Mr. Valdez's marijuana entrepreneurship. RP 493 et. seq. And again, Mr. Valdez sells Mr. Horton some marijuana extract. RP 499. And, as

before, they discuss Mr. Valdez's "list." Id. Mr. Horton represents his fictitious uncle as wanting to know "if you want to go through with it or if you just don't want to -- don't want anything to do with it, then that's fine, too." Id.

The defendant first toys with the notion of having the judge in his divorce, Mike Sullivan, murdered. "I go before him again in about six to eight months. I don't want to see that motherfucker's face again." Id. And he says he has winnowed the first name on his list down to Judge Sullivan or Ms. Robbins. Id. They discuss terms of payment again. RP 500-503. The defendant will pay in "cash or oil." RP 503.

But when he gives his answer, the defendant says: "Well, okay. I think for -- I think for now what we need to do is just table the matter. Here's the -- here's my reasons. I'd be more than happy to give you those. I mean, you certainly deserve them. Is that money is tight right now." RP 507.

Mr. Horton described himself as "satisfied" that the defendant "did not feel [hiring a killer] was something he wanted

to pursue at that particular time." RP 514-515. Unfortunately, that is not where the defendant left it. Mr. Valdez approached him "a week or two" after the June 16 recording, fresh from a meeting with his divorce attorney, "very displeased" and "worked up." RP 517-18. He said he was "ready to bite the head off the snake." RP 517. Mr. Horton temporized, saying he would meet Mr. Valdez later to make arrangements and then contacting Det. Thoma of the Task Force. RP 519. This was a disappointment to the detective and to Mr. Horton, who had hoped to go on with his life. "We thought it was over. We thought everything was done and we were all pretty happy about it." Id.

But Mr. Horton wore the wire one more time, on June 23, 2015. RP 528. That was the day Mr. Valdez "gave me some cannabis oil in payment for the murder of his [ex-]wife, and also pictures of her residence and pictures of her." RP 527. Mr. Horton passed the oil and the photos on to Task Force detectives that day along with the recording on the wire. RP 636-7.

Mr. Horton gave the defendant a last out, which was rejected:

MR. HORTON: Once we leave here -- once we leave here, the deal's done. It's done. It's solidified. I mean, we're ...
THE DEFENDANT: It was fucking done the day I said fucking do it.
MR. HORTON: Okay. Well, it's a done deal. So I'll follow you back to your place and grab the oil and I'll put it in the mail tomorrow for him. And then I'll go buy the plane ticket, cash.
THE DEFENDANT: Well, okay. Yeah. I'll give him a bonus deal, $18 a gram on the fucking oil.

RP 590.

Based on the recordings and the drugs and photographs Mr. Horton received from Mr. Valdez, Task Force detectives received and served a search warrant on his home on Altoona-Pillar Rock Road on July 3, 2015.[3] More than twenty pounds of marijuana honey oil, including 150 single-gram tubes and packaging material, were found during the search; the details will be discussed in greater particularity infra. RP 860 et. seq.

[3] The validity of that warrant is unchallenged on appeal.

Mr. Valdez was arrested the same day and questioned by the police; his recorded statement was also admitted,[4] and in it he describes himself as a "live and let live" guy who didn't have a temper or a grudge and was planning on resolving his divorce issues on appeal. RP 1210 et. seq. He professed himself unable to recall anything he may ever have said to give anyone the notion he wanted to kill his ex-wife. RP 1213.

And this was basically the defense Mr. Valdez took to the jury in a trial held in Wahkiakum County on February 16-26 – along with an early draft of the "locker room talk" defense that has gained such currency during the recent Presidential election: "[Y]ou know, once in a while Chris and I would have a conversation that were rather colorful." RP 1474.

It availed him nothing. The jury convicted him of arson in the first degree, solicitation to commit murder in the first degree, possession of marijuana with intent to distribute it, and distribution of marijuana – all counts as charged. Defendant timely appealed.

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[4] The statement's admission is unchallenged on appeal.

III. ARGUMENT

i. Motion to Change Venue

For a motion to change venue to succeed, it is the defense's burden to "show a probability of unfairness or prejudice from pretrial publicity." State v. Hoffman, 116 Wn.2d 51, 71, 804 P.2d 577, 588 (1991). It must make this showing to the trial court, which is in the best position to determine matters regarding juror fairness. State v. Noltie, 116 Wn.2d 831, 839, 809 P.2d 190 (1991). On appeal, a motion for change of venue "is within the trial court's discretion." Hoffman, supra, 116 Wn.2d at 71.

Therefore, it is not this court's task to determine whether the defense below proved a "probability of unfairness from pretrial publicity." Hoffman, supra, 116 Wn.2d at 71. Rather, this court's standard of review is whether, when the trial court ruled the defense's burden was not met, its decision was "manifestly unreasonable or based upon untenable grounds or reasons." State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239, 1257 (1997).

The appellant has focused on the a priori tests listed in State v. Crudup, 11 Wn.App. 583, 524 P.2d 479 (1974) – e.g., the size of the county and the nature and quantity of the media coverage. However, "The best test of whether an impartial jury could be empaneled is to attempt to empanel one." State v. Jackson, 150 Wn.2d 251, 271, 76 P.3d 217, 228 (2003). This is because careful voir dire can "offset the difficulties presented in final jury selection." State v. Jackson, 111 Wn.App. 660, 674, 46 P.3d 257, 265 (2002).

In Jackson, "the record regarding the final jurors shows all appeared impartial and none expressed influence from prejudicial media information or knowledge of inadmissible evidence," and thus, the Court of Appeals held that the defendant "show[ed] no probability of unfairness or prejudice from pretrial publicity." Id. See also State v. Rice, 120 Wn.2d 549, 558, 844 P.2d 416 (1993), in which, although "nearly all of 153 prospective jurors were aware of [the] case," "the record show[ed] no juror who, despite

case knowledge, had such fixed opinions that they could not act impartially. Jackson, 111 Wn.App. at 672, 46 P.3d at 264 (2002).

Similarly here. The trial court oversaw a process in which jury questionnaires were first propounded and some prospective members of the venire excluded through their responses in a process that allowed for both the State and the defense to argue. On February 1, of fifty-five venire members who returned questionnaires, the court eliminated fifteen. RP 79. That day, the defense argued that of those remaining, "minus the ones we've excused, [the potential jurors have] indicated that they can be impartial," but that "I'm really concerned about the spillover effect and just the general knowledge of the case and the dynamics of any potential involvement in sitting on this case. It just seems to be a large number to have all those people either know of someone or know the case." RP 79-79. As in Jackson, the defense "points to no seated juror with a fixed opinion impacting impartiality. He does not assign error to any of the court's specific denials of his challenges for cause." Jackson, supra, 111 Wn.App. at 674-5.

The trial court, beginning from the proper reference point ("Starting point is to try it here"), decided, "It's not surprising people have some minimal knowledge of the fact that the case exists. So starting at this point with that pool of jurors, we'll need to conduct the general voir dire here." RP 79-80.

On February 16, formal voir dire commenced. The court allowed the defense to examine the venire until counsel was out of questions. RP 189. Then the defense made five challenges for cause, and four were granted. RP 191 et. seq. The defense did not use a peremptory challenge to exclude the fifth venire member, who went on to serve on the jury. Id. Note that the defense used only five of its six peremptory challenges, so the defense could have kept that person off the jury. RP 197.

Nonetheless, the defense renewed its "general objection" to venue. The defense admitted it could point to no specific prejudice nor identify any particular juror who could not decide the case objectively. Instead, the defense merely stated, "I would send a general request again based on people's knowledge of the case as

well as -- actually, well, I'll make that, too. That venue should be changed out of this county." RP 193.

The trial court responded unequivocally: "Based on what I've heard today, I think we can seat a fair jury at this time, so I'll deny that motion." Id.

The proof of the pudding is in the eating, and the proof of whether a venire has been contaminated is in the selection of the jury. Although the amount of media attention in this case barely qualifies as the ghost of a whisper compared to the massive, long-term multimedia saturation at issue in Rice, supra (the appellant identifies only twelve news articles across three newspapers throughout the pretrial process; see its brief at 36), the trial court took the extra care contemplated in Jackson, supra, to "offset the difficulties" the case may have presented. Objective jurors were found and a jury empaneled without the defense even needing to use all its peremptory challenges. When a defendant has unused peremptory challenges remaining at the end of voir dire, this court

does not find prejudice in the jury selection process. State v. Davis, 141 Wn.2d 798, 836-37, 10 P.3d 977, 1000 (2000).

It was the defense's burden to show that something in the jury selection process probably prejudiced Mr. Valdez, and the defense failed to satisfy the trial judge that that was the case. It is the appellant's job now to show that the trial court abused its discretion in making that decision. The same record that failed to prove the lower burden at trial fails to sustain the higher one here.

ii. **Corpus Delicti**

The defense treads a fine line in its argument regarding corpus delicti in the arson charge. It cites the dispositive case, which is State v. Zuercher, 11 Wn.App. 91, 521 P.2d 1184 (1974), but distinguishes it thus: "In Zuercher, the court found that anger to the alleged victims, threats to burn the building, and the defendant's presence in the area shortly before the fire were sufficient for the admissibility of the defendant's statements under the corpus delicti rule." It is true our facts are not entirely the

same. In our case, there was anger to the alleged victims, threats to burn, and the defendant's presence in the area shortly AFTER the fire. RP 897. Hardly a difference to build a solid distinction upon.

What the appellant is trying to get this court to believe is that unless there has been some sort of scientific opinion that a human agency caused a fire, a person's confession is not admissible. But it is exactly this proposition that the Zuercher case negates. In Zuercher, as here, the precipitating event for the arson was divorce. In Zuercher, "the defendant expressed anger about the terms of the decree and malice toward his ex-wife." State v. Zuercher, 11 Wn.App. at 92. Here, the defendant's malice extended to everyone else involved with the divorce in pretty much any way, but particularly those who testified at trial in ways he considered harmful to himself. RP 270-271. And he expressed his desire to burn out those he considered his enemies:

In the case of the Bruneaus, who appellant believed assisted his ex-wife in the divorce proceedings (RP 350-351), he initially considered destroying their house by water (id.), but settled for

trying to burn their catamaran (RP 347) after surveilling and photographing it (RP 344-347).

In the case of his ex-wife, he performed "recon" with an eye towards burning her house down, and only reconsidered because she had cameras there. RP 362.

But the most important evidence was the preparation that Mr. Horton saw Mr. Valdez undertake within twenty-four hours of the burning of the Cantrell residence. Mr. Valdez, having boasted that he would "smoke out the neighborhood" and that there would be "another barbecue in the neighborhood" (RP 327), proudly brought the tools he planned to use to the informant's house – soda bottles, cotton, matches, and poisoned hamburger to silence and immobilize the dogs that died in the fire – no more than a day before the Cantrell residence burned to the ground. RP 327-328. And then the defendant drove up to the house while firefighters were still present to ask if anyone had been killed. RP 897.

This case is directly comparable to Zuercher, supra. The greatest lesson Zuercher has for us is that evidence of motive and a

desire to burn out one's enemies before a fire, and the fact of the fire, and the defendant's presence near in place and in time to the fire itself is sufficient to corroborate an arson confession even in the absence of a fire investigator's finding that the fire was set.

iii. **Sufficiency of the Evidence**

Evidence is sufficient if, after viewing it in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

Appellant correctly cites case law to the effect that possession with intent to manufacture or deliver drugs requires more than just proof of possession of a large quantity of drugs. State v. Campos, 100 Wn.App. 218, 222, 998 P.2d 893, 895 (2000). (Although the State notes that the defendant in the present case possessed a far larger quantity of drugs than Washington courts have ever been called upon to apply this rule to.) But in this case, there is ample evidence on the record that Mr. Valdez had

promised to deliver marijuana extract in payment after the murder for which he had bargained was committed. RP 590-591.

But the appellant loses this argument even on his own theory of the case. The defendant testified he was contemplating going into the marijuana business with Mr. Horton's fictitious uncle, and that this was what the recorded conversations were really about. E.g. RP 1376-77; RP 1402. This is not the case; he was trading marijuana for murder. But for the charge of possession with intent to deliver, it does not matter whether the defendant intended to deliver in exchange for money or murder. He is guilty either way.

Furthermore, the evidence is overwhelming Mr. Valdez was involved in his own drug trade even after he moved his marijuana extraction machine. According to his texts on May 28, 2015, while he was operating the machine for the new buyers on an agreement that allowed him access to the machine "24/7," he had the place to himself and, in his own words, "What I'm doing now is for me, not them." RP 1163-1164.

And that is just one snowflake in an avalanche of evidence that Mr. Valdez's involvement in the marijuana trade was deep and ongoing. In Campos, the defendant was holding slightly less than an ounce of cocaine on his own person. Campos, supra. This is what the task force found when it searched the defendant's combination home and workshop:

- 5 jars of marijuana honey oil in the freezer totaling 5808 grams (RP 860-863)
- 14 mason jars of honey oil in the refrigerator (RP 861) totaling 4828 grams
- 150 individually-packaged one-gram cartridges of honey oil, 77 of which were stored in a backpack for easy transport (RP 864)
- 1 "beaker" containing 733 grams of honey oil (RP 864)
- 1 bag of marijuana in the main shop totaling 18 grams (RP 863)
- 1 larger bag of marijuana in the garage totaling 129.2 grams (RP 864)
- Syringes that could be used to transfer honey oil from the jars to the cartridges (RP 801-802)
- Packaging materials and empty cartridges (RP 785)
- "Vape pens" used for ingestion of marijuana honey oil in cartridges; "a lot" (RP 793)
- Marijuana plants growing outside (RP 908)

The total weight of marijuana honey oil alone is 12.03 kilograms, or more than twenty-six and a half pounds. Not

counting the growing plants or the honey oil, the police found a third of a pound of weed. At the prices quoted by the defendant at trial ($8-10 per gram in bulk; $20 packaged by the gram in cartridges – RP 1478 – although Mr. Horton testified that in the cartridges the cost runs up to $30), the honey oil alone was worth up to $121, 820.00. However, when it came time to put a down payment on a hit man, the defendant himself said that $18 per gram "in a container" was a "bonus deal." RP 590. At that "bonus deal" price, the defendant's oil alone was worth $216,576.00.

Contrast this with the Campos case and its under one ounce of cocaine – still a lot of cocaine, no doubt, but nowhere near this quantity. Still, the Campos court held that the evidence to convict was sufficient because in addition to the cocaine, the defendant had cash, a pager, a charger, and a cryptic list that might have been a ledger. Campos, 100 Wn.App. at 224. The packaging equipment found in this case far exceeds the evidentiary value of what was deemed sufficient in Campos.

For that matter, the defendant engaged in marijuana transactions several times while he was being recorded! RP 533 et. seq., 590 et. seq, 384 et. seq.

But the entire preceding argument assumes what the appellant wishes the court to assume: that after the defendant's machine moved to Pacific County, there is some law that requires us to disregard all the marijuana trafficking the defendant did before then. Campos laid down no such rule, and the appellant cites no other authority to this effect. Nor does the defense make any argument as to why moving a single piece of equipment wipes the defendant's slate clean. The fact that the defendant was deeply involved in an ongoing scheme to profit from the processing and sale of marijuana constitutes "circumstantial evidence for the trial court to weigh in deciding that the State has met its burden of proof." State v. Hagler, 74 Wn. App. 232, 235, 872 P.2d 85 (1994). (In that case, a quantity of 24 rocks of cocaine and the possession of $324 cash was sufficient to support a finding a juvenile was possessing with intent to deliver. Id.)

ER 404(b)

Appellant claims "Mr. Valdez objected to the evidence of the … plans to burn the Bruneau's (sic) catamaran." Appellant's Brief at 45. The fact that this statement, which is not accompanied by citation to the record, is in the section of appellant's brief devoted to ER 404(b) implies that this was the ground of the objection. But the appellant's careful wording and lack of citation gives a false impression. This is the objection:

MR. FRICKE [Defense counsel]: Your Honor, I would object to the relevance. There's nothing in the case that involves these folks.
MS. BAUR [for the State]: It absolutely does.
THE COURT: I'll allow it.
RP 345-346.

As the court can see, the defense objected on grounds of relevance. And lest the court think that was a mistake:

Q. [Ms. Baur]: Okay. So what did the defendant tell you about the reason for paddling down to the Bruneaus'?
A. [Citizen informant]: He tried to burn the catamaran down.
Q. And what did you -- what did you think of that? What did you tell him?
MR. FRICKE: Well, I'm going to object to relevancy, what he thought of it.
RP 347.

The defense objected a final time, again on the grounds of relevancy, to testimony regarding Mr. Valdez's plans to burn the Bruneau catamaran at RP 349.

The next item was the defendant's desire to destroy the Bruneau home by clogging a culvert that protected it from floodwaters. RP 349-50. Again, the defense objected – and again, it was on grounds of relevance: "the same objection" as a moment before. RP 350. Note, too, that the defendant incorporated this information in his defense, using it to show that there were people who Mr. Valdez hated whom he did not harm. E.g., RP 728. The objection to evidence regarding appellant's having wrecked his car and plane were also made on relevance grounds only. RP 278.

An ER 404(b) objection was made regarding these issues only once, having to do with the appellant's effort to change the tax assessment on his perceived enemies' property, and that objection was sustained in the same ruling by the trial court that illuminated what its ruling would likely have been if objections had been made – namely, that much of the information would have

necessarily been admitted to explain the meaning of the recorded conversations the defendant had with Mr. Horton. RP 1007-1008.

The record the appellant elides, showing that in all cases in which the objection was overruled the defense was not objecting on ER 404(b) grounds but on grounds of relevance, disposes of appellant's challenge. It is well settled that when the objection is on grounds of relevance rather than on ER 404(b), an ER 404(b) challenge is not preserved. State v. Mason, 160 Wn.2d 910, 933, 162 P.3d 396, 407-08 (2007).

iv. **Prosecutor's Conduct**

The appellant takes the State to task for making certain arguments. As to each one of these arguments, the defense at trial made no objection.

Lightning Strike

The appellant characterizes the State's argument as one that "conflates a strike of lightening, [sic] with the real possibility..." that Mr. Horton framed the defendant. Appellant's Brief at 50. The reason the defense makes no argument beyond the conclusory

statement that this is what the State did, and cites to no authority showing such an argument is improper, is that there is no authority and no argument to back this assertion up. The appellant seems to believe that there is no "real" possibility that fires are caused by lightning. But that is a real thing that really happens. Every year, in fact. While the notion that Mr. Horton hacked a computer, faked texts, and manipulated the defendant so expertly that they had recorded conversations that sounded enough like a contract killing transaction and a confession to arson that they convinced a jury – the notion that the defense interposes as an alternative – is definitely something that doesn't happen every year. Quite simply, the appellant is wrong in thinking that a lightning strike is less probable than the elaborate frameup he posits.

Lying on the Stand

The appellant claims that the State made a "misstatement [of] reasonable doubt" in arguing, "You can't just take the stand and actually lie and say you didn't do something and never meant it anyway, and that's all it takes. That's not reasonable doubt." RP

1622-23, cited by the appellant at its brief in 51. The appellant goes on to argue, "The jurors are the sole judges of the credibility of witnesses, and if the jurors find Mr. Valdez [credible], or even if his denials create doubt, then the jury is required to acquit."

The flaw in the argument is evident in its own language: the jurors are the sole judges of credibility. The jury decides whether the defendant lied on the stand. A finder of fact is permitted to entirely disbelieve testimony, even if such testimony is uncontradicted. Riblet v. Spokane-Portland Cement Co., 45 Wn.2d 346, 349, 274 P.2d 574, 576 (1954). If the defendant lied, the jury is permitted to weigh his testimony at nothing. Saying so is nothing more than stating an uncontroversial point of law.

"Vouching"

The same analysis disposes of the appellant's argument that the State, by the same phrase objected to in the previous section, was offering a personal opinion as to a witness's credibility. Saying that a lie is not reasonable doubt – that one witness's gainsaying of another witness's testimony does not result

in automatic acquittal – is the absolute truth of the matter, and not an opinion. It is the jury's province to decide whom to believe. The judge properly instructed the jury so at RP 1547.

"Shameful"

Again without argument or citation to authority, the appellant claims that it is an "improper comment on a defense witness" – a legal concept with no currency – to observe that the witness is testifying against his own family. RP 53. Since the legal concept of "improper commentary on a witness" is not supported by policy arguments or legal citation, this court should disregard it in its entirety. State v. Marintorres, 93 Wn.App. 442, 452, 969 P.2d 501 (1999). Since the appellant could not point to any law, or make any argument, beyond a conclusory statement about propriety, there is nothing here to discuss.

"Impugning"

Observe what the appellant claims the State did here to "malign defense counsel" pursuant to State v. Lindsay, 180 Wn.2d 423, 326 P.2d 125, 130 (2014):

- "The State argued that the jury should not be diverted by issues related to Mr. Horton's credibility." Brief of Appellant, 53.
- "She also argued that the defense arguments that Mr. Horton was biased are like throwing a big rock..." Id.
- "She also argued that the defense argument that Mr. Horton could have gotten the photos of Ms. Robbins and her house off of Mr. Valdez's computer was as likely as a 'strike of lightening [sic]'." Id. At 54.

The court has already spotted the common denominator here. In each case, the State was addressing a legal issue or argument brought up by the defense, not defense counsel himself. In the case cited by the defense, State v. Thorgerson, 172 Wn.2d 438, 258 P.3d 125 (2014), a case in which the error was considered harmless, the argument complained of was that the entire defense was "sleight of hand." Id., 172 Wn.2d at 452. The court noted the intentionality behind that particular idiom and focused on that as the disparaging element of the phrase, observing that "To the extent these comments can fairly be said to focus on the evidence before the jury, we agree with the Court of Appeals that no misconduct occurred." Id., 172 Wn.2d at 451.

The State's best guess as to how the appellant wants the court to take its argument is to assume that a "distraction" implies a "distractor," and that therefore the State by using the word is calling somebody a "distractor" and that this is an insult. That was how Thorgerson, supra, 172 Wn.2d 438, did it with "sleight of hand," digging into a dictionary to determine that a magic trick required a magician. But digging into the dictionary to determine whether a "distraction" implies a human agency, we find that the American Heritage Dictionary of the English Language, 5th Edition, indicates distraction can occur with or without human agency;[5] the Oxford English Dictionary (2007 ed.) accords.[6] Therefore, suggesting something is distracting or a distraction need cast no aspersion on any individual – rather than being an ad hominem attack, it is an argument directly to the quality of the evidence, which is the very purpose of the exercise.

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[5] definition 1: "The art of distracting, or the condition of being distracted;" definition 2: "Something that makes it difficult to pay attention or that draws attention away from familiar or everyday concerns."

[6] definition in relevant part: "Diversion of the mind, attention, etc., from a particular object or course; the fact of having one's attention or concentration disturbed by something…"

The fact of the defendant's incarceration.

Note the odd presentation of the appellant's argument in appellant's brief at 54. "It is reversible error for a defendant to appear in front of a jury in shackles..." Appellant cites authority. (Note, however, that appellant's cited case, State v. Finch, 137 Wn.2d 792, 975 P.2d 967 (1999), was decided based on standards and burdens appropriate for the sentencing phase of a capital case, which are not the burdens under which we labor here). "Also, the admission of booking photos can... be improper..." Appellant cites authority. "For the same reason, it is prejudicial for the jury to know that a defendant is incarcerated during trial." Here, appellant cites no authority.

Nor, for that matter, does the appellant cite to the record indicating that information was elicited that the defendant was "incarcerated during trial." Instead, the appellant claims the State "asked Mr. Gollersrud if he visited Mr. Valdez in jail in 2016," and Mr. Gollersrud responded that he visited in 2015, not 2016. Brief, 55. Appellant cites RP 1286. But, here is what really happened:

Q [the State]. Have you visited the defendant in jail?
A [the witness, Leon Gollersrud]. Not in 2016. We've communicated.
Q. Have you visited him in jail?
A. Yes. Yes. 2015.
RP 1286.

As the court can see, the State did not even imply that the defendant was in jail in 2016; it was the evasive response of the witness that brought up the year. Note, too, that Leon Gollersrud was a defense witness. RP 1259.

Despite being inapplicable in fundamental ways to the present case, the Finch case, supra, says important things about the presentation of defendants in court. This is why it has been cited by such cases as State v. Gonzalez, 129 Wn.App. 895, 901, 120 P.3d 645, 649 (2005), where it was used as authority for the notion that, "The presumption of innocence guarantees every criminal defendant all the physical indicia of innocence, including that of being brought before the court with the appearance, dignity, and self-respect of a free and innocent man." Id., internal citations omitted. The cases dealing with restraints are not about what the jury knows about the defendant, they are about how the defendant

presents to the jury: shackled, in jail clothes, with armed guards looming always over him as in Gonzalez, or unshackled and in civilian clothes, as is preferred. The defense gives no evidence that Mr. Valdez was presented in any other way than "with the appearance, dignity, and self-respect of a free and innocent man." Gonzales, supra. He was spared the corrosive effects of the jury seeing him in a jail outfit or in restraints – and that is all the protection these cases afford him. They were never intended to protect a defendant's witnesses from cross-examination.

More importantly, note that the two lines of cases the appellant cites regarding the jury's knowledge of Mr. Valdez's incarceration are dissimilar, and neither of them consider their issues to be about prosecutorial misconduct. The Finch/Clark line of cases concern defendants at the penalty phase of a capital case who were shackled over defense objection (Finch, 137 Wn.2d at 804; State v. Clark, 143 Wn.2d 731, 975 P.3d 1006 (2001)) and were decided on constitutional grounds pursuant to a harmless-error test specifically arrived at for shackled defendants at the

penalty phase of death penalty cases. (Finch, 137 Wn.2d at 865-66; Clark, 143 Wn.2d at 775). In contrast, the Sanford/Henderson line of cases regarding admission of mugshots are decided under an ER 404(b) analysis. State v. Sanford, 128 Wn.App. 280, 285, 115 P.3d 368 (2005), State v. Henderson, 100 Wn.App. 794, 803, 998 P.2d 907 (2000). No coherent standard of review can be devised by cobbling these lines of cases together, but neither line of cases has anything to do with prosecutorial misconduct.

So what we know about the issue of Mr. Gollersrud having visited the defendant in jail is that the appellant can neither cite to case law supporting the notion that there is any wrong in the jury knowing that at some point Mr. Valdez was in jail, nor support any particular standard of review for it, nor even accurately recount the event for this court. The cases the appellant cites are not on point; the facts are wrong; the issue is entirely unsupported.

v. **Effectiveness of Counsel:**

Appellant asserts that any failure to object to issues below constitutes ineffective assistance of counsel. The burdens and

presumptions inherent in this challenge have perhaps never been better set out than recently in this division, in State v. Strange, 188 Wn.App. 679, 354 P.3d 917, (2015):

> In order to prove ineffective assistance of counsel, Strange bears the burden to prove that defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). We need not consider both prongs of this test if the defendant fails to prove either one. Strickland v. Washington, 466 U.S. 668, 697, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). We apply a strong presumption that trial counsel was not deficient, and we do not consider matters outside the record. McFarland, 127 Wn.2d at 335.
>
> Where a defendant claims ineffective assistance of counsel for his trial counsel's failure to object, he must also prove that the decision not to object was not a legitimate trial tactic. State v. Hendrickson, 129 Wn.2d 61, 79-80, 917 P.2d 563 (1996). "If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as a basis for a claim that the defendant did not receive effective assistance of counsel." State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). We apply a strong presumption that trial counsel rendered adequate assistance and "made all

> significant decisions in the exercise of reasonably professional judgment," and the reasonableness of counsel's performance must be performed in view of all of the facts and circumstances of the case. Lord, 117 Wn.2d at 883. In particular, "[t]he decision whether to object is a classic example of trial tactics, and only in egregious circumstances will the failure to object constitute ineffective assistance of counsel." State v. Kolesnik, 146 Wn. App. 790, 801, 192 P.3d 937 (2008).

State v. Strange, 188 Wn.App. at 687-88.

Furthermore, "The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error." In re Pers. Restraint of Davis, 152 Wn.2d 647, 673, 101 P.3d 1, 16 (2004).

The first of appellant's challenges fails to take Davis, supra, into account. After the State closed its case, the defense moved the trial court to dismiss the arson case based on the same corpus delicti argument that the appellant now floats before this court. RP 1247. Knocking out the arson count is something the defense contemplated as early as November of the previous year, when it considered filing a Knapstad motion. State v. Knapstad, 41 Wn. App. 781, 706 P.2d 238 (1985). RP 3. Instead, it waited.

Before the state rested, the defense could not have been certain what evidence it would hear at trial, and thus whether a corpus delicti objection could be made or how to present it. Anyway, the defendant lost then and should have lost; would have lost earlier if he had made the motion earlier; and under any standard of review that has the Strange court using the phrase "strong presumption" twice, it is impossible for the appellant to prove his counsel was deficient for waiting to make a motion until all the facts were in. But more fundamentally than all this, we must remember that the appellant has the burden of proving the lack of a tactical reason and that the circumstances were egregious. Strange, supra. The appellant cannot overcome the "strong presumption" against him in a single paragraph on page 56 of his brief with neither any attempt to shoulder a burden why this was not a tactical decision, nor any citation to precedent.

Appellant next challenges trial counsel for having failed to object to information regarding the defendant's plane wreck, the car crash that ended in the defendant having to pay his ex-wife

another ten thousand dollars, and his desire to burn the catamaran and destroy the home of another perceived supporter of his ex-wife. Again, this is more of a gesture in the direction of proof than a serious attempt to shoulder a burden against a "strong presumption" against him that can only succeed if circumstances are "egregious." Strange, supra. Since the appellant made hay at trial of the fact that the defendant hated others whom he did not try to kill, RP 728, and since appellant's position lacks argument or citation to precedent, the appellant has not overcome the "strong presumption" that trial counsel was adequate. Besides, this evidence was overshadowed by the defendant's own recorded words, which backed up every inference the State asked the jury to draw from these other items.

The appellant challenges trial counsel's failure to object during the State's closing argument in a single paragraph of three sentences, of which the only argument is the sentence, "The arguments were clearly improper and highly prejudicial," which isn't really an argument at al. Appellant's Brief, 56-57. In

addition to not shouldering the burden set out in Strange, supra, and objecting to items the State has already shown were perfectly appropriate, the appellant faces, and fails to overcome, an additional burden unique to failure to object at closing argument: "Defense counsel's performance is not below standard and unprofessional when counsel refrains from objecting during the prosecutor's closing argument because it is uncommon for lawyers to object during closing argument absent egregious misstatements." In re Pers. Restraint of Davis, supra, 152 Wn.2d at 758. Having failed to overcome the burdens imposed in Strange, appellant cannot prevail over this additional burden.

The appellant's final gesture in the direction of argument on defense counsel ineffectiveness is a paragraph of three conclusory sentences about defense counsel's failure to object to the State's question whether Leon Gollersrud visited the defendant in jail. Since the appellant failed to prove this was inadmissible supra, three sentences without argument can hardly surmount the

additional burdens to which the appellant is subject when bringing up the issue in the context of effectiveness of counsel.

vi. **"Cumulative Error"**

There having been no error, no error could accumulate.

In any event, the appellant has quite a burden to prevail on this issue. "[P]etitioner bears the burden of showing multiple trial errors and that the accumulated prejudice affected the outcome of the trial." In re Pers. Restraint of Cross, 180 Wn.2d 664, 690, 327 P.3d 660, 678 (2014). Appellant attempts to shoulder this burden not by highlighting claimed errors or attempting to show that they multiply one another, but by spending three pages arguing the defense's factual theory of the case. RP 57-60. Appellant tries, in this second closing argument, to undermine the fact that the defendant was audio recorded as he gave valuable drugs and a dossier on his ex-wife to a man he thought was going to pass them on to an assassin. The reason the appellant thinks the recordings are crucial is that they are. The appellant has taken issue with

everything around them but nothing directly about them because, for the defense, there is no facing them head-on.

The State does not intend to reargue the case by pointing this out, but merely to suggest two things: First, no "accumulated prejudice" changed the outcome of the trial because its outcome was never in doubt from the moment the court ruled the audio recordings admissible. Second, this court should disregard the appellant's biased statement of facts in the argument section of its already-overlength brief. The jury has had its say. See, e.g.:

> This court will not willingly assume that the jury did not fairly and objectively consider the evidence and the contentions of the parties relative to the issues before it. The inferences to be drawn from the evidence are for the jury and not for this court. The credibility of witnesses and the weight to be given to the evidence are matters within the province of the jury and even if convinced that a wrong verdict has been rendered, the reviewing court will not substitute its judgment for that of the jury, so long as there was evidence which, if believed, would support the verdict rendered.

State v. O'Connell, 83 Wn.2d 797, 839, 523 P.2d 872, 897 (1974) (citations omitted).

vii. **Blazina challenge**

In State v. Blazina, 182 Wn.2d 827, 838, 34 P.3d 680 (2015), the court held, "The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay. Within this inquiry, the court must also consider important factors... such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay." Id. But the court also said, "Unpreserved LFO errors do not command review as a matter of right." Blazina, 182 Wn.2d at 833.

Here, there was no objection to legal financial obligations at trial, and the record regarding the defendant's financial situation was copious. This court should neither review nor upset the trial court's award of costs under these circumstances, which are the farthest thing from the "boilerplate" considerations that motivated the Blazina court. Blazina, 182 Wn.2d at 838.

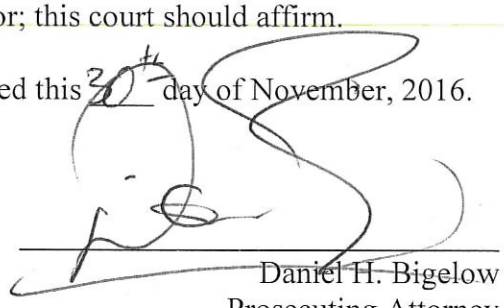
Costs

The State does intend to seek an award of costs on appeal. The defendant's assets are tied up in litigation with the Cantrells, whose house he burned. But if he prevails, his assets may return to him. If they do, he will be able to pay costs as well as his legal-financial obligations. If they do not and he is unable to return to work, then his inability to pay can be considered by a later court.

IV. CONCLUSION

The defendant tried to hire a murderer and pay in "cash or [marijuana] oil." The jury heard the defendant's own recorded words and decided he was serious. And they had his words, evidence that he showed off his arson kit, and evidence that he was near the fire, to prove that he committed arson against the Cantrells. There was no error; this court should affirm.

Respectfully submitted this 30th day of November, 2016.



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CERTIFICATE

I certify that I mailed a copy of the foregoing Respondent's Brief to the following addresses, postage prepaid, on November 30 ,2016.

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Plaintiff vs. SAMUEL F. VALDEZ, Defendant	No. 48740-3-II AFFIDAVIT OF MAILING

GERI L. ROOKLIDGE, having first been duly sworn on oath, deposes and says:

1. I am the administrative assistant for the Wahkiakum Prosecuting Attorney.

2. On November 30, 2016, I sent by U.S. Mail, postage prepaid, to Samuel F. Valdez, DOC #389557, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326-9723, Jennifer Freeman, Attorney for Appellant, Pierce County Dept. of Assigned Counsel, 949 Market Street, Suite 334, Tacoma, WA 98402, and David C. Ponzoha, Court Clerk, Washington State Court of Appeals, Division, II, 950 Broadway, Suite 300, Tacoma, WA 98402-4454, the following document: ***Motion for Overlength Brief.***

Geri L. Rooklidge
GERI L. ROOKLIDGE

SUBSCRIBED AND SWORN to before me this 30th day of November, 2016.

TERESA G. MCMAHON
NOTARY PUBLIC
STATE OF WASHINGTON
My Commission Expires: AUGUST 29, 2019

Teresa G. McMahon
Teresa G. McMahon, Notary Public
in and for the County of Wahkiakum, residing
at Cathlamet. My commission expires: 08-29-2019